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4                   UNITED STATES DISTRICT COURT  
5                   WESTERN DISTRICT OF WASHINGTON  
6                   AT TACOMA  
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9                   JASON PAUL CHESTER,  
10  
11

12                   Plaintiff,

13                   v.  
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15                   UNIVERSITY OF WASHINGTON, et  
16                   al.,  
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18                   Defendants.

19                   CASE NO. C11-5937 BHS  
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21                   ORDER GRANTING IN PART  
22                   AND DENYING IN PART  
23                   DEFENDANTS' MOTION TO  
24                   DISMISS AND DENYING  
25                   PLAINTIFF'S MOTION FOR  
26                   ATTORNEY FEES  
27

28                   This matter comes before the Court on Defendants' motion to dismiss Plaintiff's  
29  
30 42 U.S.C. § 1983 claims and all claims against individual Defendants (Dkt. 21); and  
31  
32 Plaintiff Jason Chester's ("Chester") motion for attorney fees. Dkt. 23. For the reasons  
33 stated herein, the Court has considered the pleadings filed in support of and in opposition  
34 to the motions and the remainder of the file and hereby grants in part and denies in part  
35 Defendants' motion and denies Chester's motion.  
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37                   I. FACTUAL & PROCEDURAL HISTORY  
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39                   On November 16, 2011, Chester filed a Complaint in the above-captioned matter  
40 on November 16, 2011. Dkt. 1-1. He subsequently filed a First "Amended" Complaint.  
41 Dkt. 42. Chester alleges causes of action against the University of Washington  
42

1 (“University”) as a Defendant, along with University employees Cedric Howard, Jeri  
2 Carter, Nancy Cook, Hope Stout, Darren Bailey, and Laura Delval (collectively  
3 “Defendants”). *Id.* The University does not dispute that the named individuals were  
4 acting within their employment during all times. Dkt. 21. In Chester’s initial complaint,  
5 he alleges causes of action under the Americans with Disabilities Act (“ADA”), Section  
6 504 of the Rehabilitation Act (“RA”), and 42. U.S.C. § 1983 claims based on violations  
7 of the First, Fourth and Sixth Amendments to the United States Constitution. Dkts. 1-1,  
8 10 and 11.

9 On March 30 and 31, 2012, Chester made motions to amend his complaint (Dkts.  
10 10 and 11), attaching to those motions what he termed “Supplemental Proposed  
11 Complaint[s].” Dkt. 10-2 and 11-3. On April 19, 2012, the Court issued an order  
12 denying Chester’s motion to amend his complaint as moot because, at that time, he could  
13 amend without leave of Court. Dkt. 18.

14 On May 17, 2012, the University and individually named Defendants filed the  
15 instant motion to dismiss Chester’s 42 U.S.C. § 1983 claims and all claims against  
16 individual Defendants. Dkt. 21. On May 26, 2012, Chester filed a response in opposition  
17 to Defendants’ motion. Dkt. 23. On June 8, 2012, the Defendants filed a reply. Dkt. 27.  
18 On June 19, 2012, Chester filed an amended complaint entitled First “Amended”  
19 Complaint (Dkt. 42), alleging breach of contract and causes of action under the ADA,  
20 RA, Washington Law Against Discrimination, and § 1983, based on an alleged violation  
21 of the Sixth Amendment. The Court accepts this document (Dkt. 42) as Chester’s  
22 complaint. Because Chester’s first amended complaint does not contain allegations

1 involving his First and Fourth Amendment rights, the Court does not address the portions  
2 of the Defendants' motion for dismissal of those claims.

3 **II. DISCUSSION**

4 Defendants argue dismissal is appropriate for the majority of Chester's claims  
5 because he has asserted non-cognizable and duplicative causes of action under the ADA  
6 and the RA against individual Defendants. Additionally, Defendants seek dismissal  
7 arguing the Eleventh Amendment bars Chester's 42 U.S.C. § 1983 claims against state  
8 Defendants, and because Chester otherwise Sixth Amendment claim must fail as a matter  
9 of law. Dkt. 21 at 4-5.

10 In his response brief, Chester "objects" to Defendants' motion to dismiss because  
11 it contains mere recitations of the law based on inferences and nothing more. Dkt. 23 at 2.  
12 He claims that "each and every allegation of discrimination ... is factual and true," and  
13 defendants "do not directly cite examples from Plaintiff's complaint or cite any specific  
14 examples whatsoever." *Id.* Chester further opposes Defendants' motion because  
15 "[m]ost, all issues and arguments too, conflict with the Federal Rules of Civil Procedure"  
16 and common law. *Id.* Additionally, he maintains that Defendants brought the motion to  
17 "prevent justice," and he makes a motion for attorney fees. *Id.* Chester also maintains  
18 that *pro se* pleadings are held to less stringent standards than ones drafted by practicing  
19 attorneys. Dkt. 23 at 4.

20 The Court acknowledges Chester's *pro se* status and construes his pleadings  
21 accordingly. While the Court has considered Chester's objections and other arguments  
22 made in his response, it finds they lack merit. Defendants' motion is based on the

1 argument that Chester's complaint fails to assert a cognizable legal theory supported by  
2 alleged facts under which Chester may proceed. When Defendants' arguments are not  
3 supported by the law, the Court makes note, if it deems necessary. The Court finds no  
4 reason to grant Chester attorney fees.

5 **A. Standard for Fed. R. Civ. P 12(b)(6) Dismissal**

6 A Rule 12(b)(6) dismissal is proper when the complaint fails to allege either a  
7 cognizable legal theory or absence of sufficient facts alleged under a cognizable legal  
8 theory. *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1041 (9th Cir.  
9 2010). Where the complaint reveals on its face that defendant lacks the capacity to be  
10 sued, a Rule 12(b)(6) motion will lie. *See De Saracho v. Custom Food Machinery, Inc.*,  
11 206 F.3d 874, 878 (9th Cir. 2000). To survive a motion to dismiss, a complaint must  
12 contain sufficient factual matter to state a facially plausible claim to relief. *Ashcroft v.*  
13 *Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). In essence, as the  
14 Ninth Circuit has stated, “[t]he issue is not whether a plaintiff's success on the merits is  
15 likely but rather whether the claimant is entitled to proceed beyond the threshold in  
16 attempting to establish his claims.” *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir.  
17 1978). The Court must determine whether or not it appears to a certainty under existing  
18 law that no relief can be granted under any set of facts that might be proved in support of  
19 plaintiffs' claims. Again, “[d]ismissal can be based on the lack of a cognizable legal  
20 theory or the absence of sufficient facts alleged under a cognizable legal theory.”  
21 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

1     **B. No Individual Liability under the ADA**

2                 Title II (Public Services) of the ADA, which applies to public universities,  
 3 provides that “[n]o qualified individual with a disability shall, by reason of such  
 4 disability, be excluded from participation or be denied the benefits of the services,  
 5 programs, or activities of a public entity, or be subjected to discrimination by any such  
 6 entity.” 42 U.S.C. § 12132. A potential defendant under the statute is any “public entity”  
 7 which includes, among others, “any State or local government”; and “any department,  
 8 agency, special purpose district, or other instrumentality of a State or States or local  
 9 government.” 42 U.S.C. § 12131.

10                 While the Ninth Circuit has not squarely addressed the issue in a published  
 11 opinion,<sup>1</sup> district courts, including those within the Ninth Circuit have determined that a  
 12 public actor may not be sued in his or her individual capacity under Title II of the ADA.  
 13 *Thomas v. Nakatani*, 128 F. Supp. 2d 684 (D. Hawaii 2000) (no individual capacity suit  
 14 under Title II of the ADA); *A.B. ex rel. B.S. v. Adams-Arapahoe 28J School Dist.*, 831 F.  
 15 Supp. 2d 1226 (D. Colo. 2011) (no individual liability under either Title II of the ADA or  
 16 the RA). *Becker v. State of Oregon, ODOC, et al.*, 170 F. Supp. 2d 1061,1066 (D. Or.  
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18                 <sup>1</sup> The Court does not rely on unpublished Ninth Circuit decisions to support its finding.  
 19 However, it notes two unpublished Ninth Circuit cases holding that no individual liability exists  
 20 under either Title II of the ADA or § 504 of the RA. See, e.g., *Burgess et al. v. Carmichael*, 37  
 21 Fed. Appx. 288 (2001) (affirming district court’s dismissal of plaintiff’s claims against  
 22 individual defendants reasoning plaintiffs may sue only “public entity” for such violations, not  
 government officials in their individual capacities) (*citing Vinson v. Thomas*, 288 F.3d 1145,  
 1156 (9th Cir. 2002); *Young v. Lehaman*, 171 Fed. Appx. 625 (2006) (claims against defendants  
 under Title II of the ADA and the RA in their individual capacities are foreclosed)) (*citing Vinson*  
*v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002), and *Alsbrook v. City of Maumelle*, 184 F.3d  
 999, 1005 n. 8, 1011-12 (8th Cir. 1999) (en banc)).

1 2000) (finding a potential defendant is any “public entity” and individual defendants  
2 cannot be sued in their individual capacities under Title II).

3 Additionally, in *Alsbrook v. City of Maumelle*, 184 F.3d 999 (1999), the Eighth  
4 Circuit has ruled on the issue, reasoning and finding the following:

5 It is unclear from the complaint whether Alsbrook is asserting an ADA claim  
6 against the commissioners in their individual capacities. To the extent that he  
7 is, we agree with the panel opinion’s conclusion that the commissioners may  
8 not be sued in their individual capacities directly under the provisions of  
9 Title II. Title II provides disabled individuals redress for discrimination by a  
10 “public entity.” *See* 42 U.S.C. § 12132. That term, as it is defined within the  
statute, does not include individuals. *See* 42 U.S.C. § 12131(1); *see also*  
*Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S.Ct. 242,  
62 L.Ed.2d 146 (1979) (“[I]t is an elemental canon of statutory construction that  
where a statute expressly provides a particular remedy or remedies, a court must  
be chary of reading others into it.”).

11 184 F.3d at 1005.

12 The Court finds that, consistent with language of the statute, specifically the term  
13 “public entity,” district court rulings and Eighth Circuit precedent, Chester’s Title II  
14 ADA claims against Defendants in their individual capacities should be dismissed.  
15 Defendants in their official capacities remain.

16 **C. No Individual Liability under the Rehabilitation Act**

17 29 U.S.C. § 795 (“section 504”) states in pertinent part:

18 No otherwise qualified individual with a disability in the United  
19 States ... shall, solely by reason of his or her disability, be excluded from  
the participation in, be denied the benefits of, or be subjected to  
20 discrimination under any program or activity receiving Federal financial  
assistance.

21 To survive a motion to dismiss, Chester’s *prima facie* case must set out four  
22 elements: “(1) that [he] is a ‘handicapped individual’ under the Act, (2) that [he] is

1 ‘otherwise qualified’ for the [benefit] sought, (3) that [he] was [discriminated against]  
2 solely by reason of [her] handicap, and (4) that the program or activity in question  
3 receives federal financial assistance.” *Johnson by Johnson v. Thompson*, 971 F.2d 1487,  
4 1492 (10th Cir. 1992) (quoting *Strathie v. Dep’t of Transp.*, 716 F.2d 227, 230 (3d Cir.  
5 1983)), *cert. denied*, 507 U.S. 910, 113 (1993).

6       Although Chester’s amended complaint does allege that “Defendants as a *public*  
7 *entity*” are recipients of federal funds (Dkt. 42 at 8, 9, and 11) (emphasis added), his  
8 complaint does not allege that any Defendants in their individual capacities are recipients  
9 of federal funds, only that Defendants as a “public entity” are. *Id.* Defendants as “public  
10 entit[ies]” could reasonably be construed as Defendants in their official capacities, but  
11 that phrase cannot reasonably be interpreted to mean Defendants in their individual  
12 capacities. Chester has not pled facts to implicate Defendants in their individual  
13 capacities under section 504. Additionally, because Defendants in their individual  
14 capacities cannot receive federal funding such that they are subject to liability under  
15 section 504, no such facts could be sufficiently pled.

16       In *United States Dept. of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597,  
17 605 (1986), the Supreme Court focused on who could and who could not be held liable as  
18 recipients of federal funds under section 504. “Congress limited the scope of § 504 to  
19 those who actually ‘receive’ federal financial assistance because it sought to impose §  
20 504 coverage as a form of contractual cost of the recipient’s agreement to accept the  
21 federal funds.” 477 U.S. at 605. By accepting the funds, one accepts the obligations that  
22 go along with it, namely, the obligation not to exclude from participation, deny benefits

1 to, or subject to discrimination an otherwise qualified handicapped individual solely by  
2 reason of her handicap. Only by declining the federal financial assistance can one avoid  
3 this obligation. "By limiting coverage to recipients, Congress imposes the obligation of §  
4 504 upon those who are in a position to accept or reject those obligations as a part of the  
5 decision whether or not to 'receive' federal funds." *Id.* at 606.

6 Given the Supreme Court ruling, while Defendants in their official capacities  
7 could receive federal funding subjecting them to section 504 liability, the Defendant  
8 employees in their individual capacities cannot receive such funds; therefore, Chester  
9 could not meet the fourth element required to make out a *prima facie* case under section  
10 504 .

11 Additionally, as Defendants point out, although the Ninth Circuit has not directly  
12 addressed the issue of whether section 504 itself provides for individual capacity suits  
13 against public officials, other circuit courts of appeal as well as district courts have  
14 determined that section 504 does not provide for such suits. *See* Dkt. 21 at 6 and footnote  
15 1 of this order. *See, e.g., Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 462 (2nd Cir.  
16 2001) (holding "insofar as Garcia is suing individual defendants in their individual  
17 capacities, neither Title II of the ADA nor §504 of the Rehabilitation Act provides for  
18 individual capacity claims against state officials") (case citations omitted); *Adams-*  
19 *Arapahoe*, 831 F. Supp. 2d at 1254 (no individual liability under either Title II of the  
20 ADA or the RA). The Court finds these cases persuasive and adopts their holding.

1 For the foregoing reasons, Chester's RA claims against Defendants in their  
2 individual capacities are dismissed. Claims against Defendants in their official capacities  
3 remain.

## **4 | D. Claims against Defendants in their Official Capacities**

5 Defendants argue that claims against all individual Defendants in their official  
6 capacities should be dismissed because they are essentially claims against the  
7 government entity itself. Dkt. 21 at 7-8. However, Defendants also maintain that there is  
8 no *Monell* theory of liability applicable to this case, and the Court agrees. *See* Dkt. 21 at  
9 9 and footnote 2 of this order. The cases Defendants have cited for the proposition that  
10 official capacity suits should be treated as suits against the entity itself, involve municipal  
11 liability, which is inapplicable to this case. Therefore, as articulated above, the Title II  
12 and RA claims against individual Defendants in their official capacities remain.

<sup>13</sup> E. 42 U.S.C. § 1983 Claims Against the University and University Employees<sup>2</sup>

14 The University argues that Chester's claims under 41 U.S.C. § 1983 are barred by  
15 the Eleventh Amendment; that Chester has failed to allege sufficient facts to support a  
16 cognizable First Amendment claim; that his Sixth Amendment claim, involving criminal  
17 prosecutions, must fail as a matter of law; and that Chester fails to allege facts that  
18 support a Fourth Amendment claim. However, as the Court indicated at the beginning of

<sup>2</sup> Based on Chester's prior complaint, Defendants argue that there can be no individual liability under 42 U.S.C. § 1983 based on violation of the ADA and the RA. Dkt. 21 at 6–7. While it appears that in Chester's first amended complaint he has abandoned any such allegation, to the extent that he has not, the Court agrees with the Defendants. *Vinson v. Thomas*, 288 F.3d 1145, 1155 (9th Cir. 2002) (holding a plaintiff cannot bring an action under § 1983 against a state defendant in his individual capacity to vindicate rights created under Title II or section 504 of the RA; those claims are barred by the comprehensive remedial schemes of those acts).

1 this order, Chester's first amended complaint does not allege First or Fourth Amendment  
 2 causes of action. Therefore, we address Defendants' argument regarding only the  
 3 Eleventh and Sixth Amendments.

4 **1. Eleventh Amendment**

5 The Eleventh Amendment bars suits against the state or its agencies for all types  
 6 of relief absent unequivocal consent by the state. Dkt. 21 at 8, n.7 (*citing Krainski v.*  
 7 *Nevada ex rel. Bd. of Regents of Nevada System of Higher Educ.*, 616 F.3d 963, 968 (9th  
 8 Cir. 2010), *cert. denied*, 131 S. Ct. 1678) (dismissing claims against University of Las  
 9 Vegas Nevada under Eleventh Amendment). The Eleventh Amendment jurisdictional  
 10 bar applies regardless of the nature of relief sought and extends to state instrumentalities  
 11 and agencies. *Id.* (*citing see Papasan v. Allain*, 478 U.S. 265, 276 (1986)). Thus, the  
 12 University contends, Chester's claims against the University of Washington are barred by  
 13 the Eleventh Amendment. Dkt. 21 at 8. The Court agrees.

14 Additionally, the Eleventh Amendment also shields state officials from official  
 15 capacity suits. *Krainski*, 616 F.3d 963, 968 (*citing see Will v. Mich. Dep't of State Police*,  
 16 491 U.S. 58, 71 (1989) (clarifying that suits against state officials in their official  
 17 capacity are no different from suits against the state itself)). Therefore, the Defendants  
 18 argue that Chester's claims against individuals in their official capacities<sup>3</sup> should also be  
 19 dismissed. Again, the Court agrees.

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 21       <sup>3</sup> The University also argues that Chester has failed to allege an unconstitutional policy,  
 22 practice of custom of the University to satisfy the *Monell v. Dep't of Social Servs. of N.Y.*, 436  
 U.S. 658, 690 n. 55 (1978). Dkt. 21 at 9. According to the University, even if Chester had

1 As the Defendants note, they are not seeking dismissal of Chester's ADA and RA  
 2 claims against the University but rather his constitutional claims. Dkt. 21 at 2 n. 1. The  
 3 University acknowledges that the Eleventh Amendment does not bar claims brought  
 4 under the ADA or the RA, and thus it is not seeking dismissal of those claims under the  
 5 Eleventh Amendment. Dkt. 21 at 8, n.7 (*citing Clark v. California*, 123 F. 3d 1267, 1269  
 6 (9th Cir. 1997)) ("Congress has unequivocally expressed its intent to abrogate State's  
 7 immunity [from suit in federal court] under both the ADA and the Rehabilitation Act.").

8       **2. Sixth Amendment**

9       The text of the Sixth Amendment reads:

10      In all criminal prosecutions, the accused shall enjoy the right to a speedy  
       and public trial, by an impartial jury of the State and district wherein the  
       crime shall have been committed, which district shall have been previously  
       ascertained by law, and to be informed of the nature and cause of the  
       accusation; to be confronted with the witnesses against him; to have  
       compulsory process for obtaining witnesses in his favor, and to have the  
       Assistance of Counsel for his defense.

14      U.S. Const. Amend. VI. Defendants correctly argue that the Sixth Amendment is utilized  
 15 in criminal settings (Dkt. 21 at 10), as the plain language at the beginning of the  
 16 amendment establishes – "In all criminal prosecutions...." *Id.* As the Defendants  
 17 contend, the Sixth Amendment [']s... reach is only to protect the attorney-client  
 18 relationship from intrusion in the *criminal setting*. *Id.* (*citing Wolff v. McDonnell*, 418

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20      alleged such facts the "Supreme Court has expressly declined to extend even *Monell*'s theory of  
 21 municipal liabilities under §1 983 to state entities, like the University. Dkt. 21 at 9. *Krinski*, 616  
 22 F.3d at 968; *Will*, U.S. 58 at 70-71. Accordingly, the University argues that Chester may not  
       bring an action against the University or its employees in their official capacities under *Monell*.  
*Id.* The Court agrees.

1 U.S. 539 (1974) (in civil rights action challenging administrative procedures and  
2 practices at Nebraska penal complex, plaintiff alleged a violation of his Sixth  
3 Amendment rights and court held the amendment was applicable in criminal settings). In  
4 this case, Chester's Sixth Amendment claim must necessarily fail.

### III. ORDER

6 Therefore, it is hereby **ORDERED** that Chester's motion for attorney fees is  
7 **DENIED** (Dkt. 23), and Defendants' motion to dismiss (Dkt. 21) is **GRANTED** in part  
8 and **DENIED** in part as follows:

1. Defendants' motion is **GRANTED** and Title II claims against Defendants in their individual capacities are **DISMISSED**.
  2. Defendant's motion is **GRANTED** and section 504 claims against Defendants in their individual capacities are **DISMISSED**.
  3. Defendants' motion is **DENIED** as to the Title II claims against Defendants in their official capacities.
  4. Defendants' motion is **DENIED** as to the Section 504 claims against Defendants in their official capacities.
  5. Defendants' motion is **GRANTED**, and Chester's 42 U.S.C. § 1983 claims, including his Sixth Amendment Claim, are **DISMISSED**.

Dated this 21st day of August, 2012.

  
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**BENJAMIN H. SETTLE**  
United States District Judge